Attachment 1

Provisional Language and Background Information

Washington Office Instruction Memorandum 2014-XXX

Implementing Grazing Provisions in the Consolidated Appropriations Act, 2014

Section 122 of PL 113-76 reads as follows:

Paragraph (1) of Section 122(a) of division E of Public Law 112–74 (125 Stat. 1013) is amended by striking ''2012 and 2013 only,'' in the first sentence and inserting ''2012 through 2015,''.

Section 122(a) of PL 112-74 reads as follows:

(1) For fiscal years 2012 and 2013 only, a person may bring a civil action challenging a decision of the Bureau of Land Management concerning grazing on public lands (as defined in section 103(e) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702(e))) in the Federal District Court only if the person has exhausted the administrative hearings and appeals procedures established by the Department of the Interior, including having filed a timely appeal and a request for stay.

(2) An issue may be considered in the judicial review of a decision referred to in paragraph (1) only if the issue was raised in the administrative review process described in such paragraph.

(3) An exception to the requirement of exhausting the administrative review process before seeking judicial review shall be available if a Federal court finds that the agency failed or was unable to make information timely available during the administrative review process for issues of material fact. For the purpose of this paragraph, the term "timely" means within 120 calendar days after the date that the challenge to the agency action or amendment at issue is received for administrative review.

Background: The Department of the Interior (DOI) regulations at 43 CFR §§ 4.21(c) and 4.479(e) already requires exhaustion of administrative remedies prior to bringing a lawsuit in Federal District Court. Section 122 of PL 113-76 extends through FY 2015 Congress' intent to clarify the exhaustion requirement.

Section 125 of Public Law 113-76 reads as follows:

During fiscal years 2014 and 2015, the Bureau of Land Management may, at its sole discretion, review planning and implementation decisions regarding the trailing of livestock across public lands, including, but not limited to, issuance of crossing or trailing authorizations or permits, under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). Temporary trailing or crossing authorizations across public lands shall not be subject to protest and/or appeal under subpart E of part 4 of title 43, Code of Federal Regulations, and subpart 4160 of part 4100 of such title.

Background: Regulations provide that the BLM "may" issue a crossing permit (43 CFR 4130.6-3). If the AO elects to issue a crossing permit, it must have had an appropriate analysis under NEPA. Section 125 removes the application of the protest and administrative appeals process from the issuance of crossing authorizations or permits. Congress has used mandatory language stating that "[t]emporary trailing or crossing authorizations across public lands shall not be subject to protest and/or appeal under subpart 4160 of part 4100 of such title."

Section 125 addresses the section of Subpart 4160 dealing with protests and/or the administrative appeals process only. Section 125 does not change the requirements for notification of a decision issued under 43 CFR § 4160.1. Because Section 125 removes the application of the protest process to issuing crossing authorizations or permits, the FO would no longer need to first issue a proposed decision, but would provide this notification to affected permittees/lessees and the interested public by issuing a final decision.

Section 411 of Public Law 113-76 reads as follows:

Section 415 of division E of Public Law 112–74 is amended by striking ''and 2013'' and inserting ''through 2015''.

Section 415 of PL 112-74 reads:

The terms and conditions of section 325 of Public Law 108-108 (117 stat. 1307), regarding grazing permits at the Department of the Interior and the Forest Service, shall remain in effect for fiscal year 2012 and 2013. A grazing permit or lease issued by the Secretary of the Interior for lands administered by the Bureau of Land Management that is the subject of a request for a grazing preference transfer shall be issued, without further processing, for the remaining time period in the existing permit or lease using the same mandatory terms and conditions. If the authorized officer determines a change in the mandatory terms and conditions is required, the new permit must be processed as directed in section 325 of Public Law 108-108.

Background: Section 411 of PL 113-76 extends through the end of FY 2015, the authority to issue grazing permits and leases (permits) under the provisions in Section 325 of PL 108-108. Section 325 provides the process for authorizing grazing until a permit is issued in compliance with all applicable law and regulatory processes. Section 411 provides the authority for using the processes in Section 325 until September 30, 2015. In addition, Section 411 provides direction for issuing permits following a transfer of preference.

A permittee seeking a renewed permit must satisfy the "mandatory qualifications" as laid out in 43 CFR § 4110.1. One of the mandatory qualifications is a "satisfactory record of performance" with respect to the expiring grazing permit as determined by the authorized officer. See 43 CFR § 4110.1(b).

The BLM employs a two-step process with respect to transfers. For transfers from one operator to another, Step 1 involves the BLM approval of a transfer of the "grazing preference" from the transferor to the transferee. This action is eligible for a categorical exclusion (CX) under NEPA

(see 516 DM 11.9(D)(1)). Step 2 involves issuing a new permit to the transferee.[1] See 43 CFR § 4110.2-3(a)(3); see also 43 CFR § 4110.2-3(d), noting that the transferor's permit terminates automatically when the BLM approves the transfer of preference. Step 2 (issuance of the new permit) is not an action eligible for a CX, and absent application of the Section 411 grazing provision, the issuance of a new permit must be done in compliance with all applicable laws, including NEPA.

[1] If the transfer action consists solely of a single party transferring preference between properties already owned (making the party both the "transferor" and "transferee" simultaneously) and there is no change to the associated permit or lease, then Step 2 is not implicated (i.e. a new permit is not issued to the "transferee").